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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 312.

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II, PETITIONER.

BRIEF OF RESPONDENT, LUCAS COUNTY, OHIO.

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"State Court May Grant Specific Performance of No-Strike Clause Under Section 301(a) of Taft-Hartley Act," 106 *Univ. of Pennsylvania L. R.* 1070 (1958) ---------- 20

Constitution.

No portion of the Constitution of the United States is quoted specifically in this Brief. From time to time reference is made to the Constitution by using the expressions "due process of law" or "constitutional rights."

Statutes.

No statute is directly cited in this Brief. A law review annotation in 106 *Univ. of Pennsylvania L. R.* 1070 refers to Section 301(a) of the Taft-Hartley Act (See above table of authorities under heading, "Law Review Annotations").

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BRIEF OF RESPONDENT, LUCAS COUNTY, OHIO.

REPORTS OF OPINIONS IN LOWER COURTS.

The statement of the petitioner on the first page of his brief is correct, except that the opinion of the Supreme Court of Ohio is also printed in 175 Northeastern Reporter, Second Series, page 59 and in 15 Ohio Opinions, Second Series, page 449.

JURISDICTION.

The statement of the petitioner on the first page of his brief is correct.

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE OF COURT INVOLVED.

The petitioner's statement with respect to constitutional provisions and statutes is correct. To them also is added the following portion of Section 1 (f) of Rule 23 of the Revised Rules of this Court, namely,

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed

were raised; the method of raising them (e.g. by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal questions was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

QUESTIONS PRESENTED FOR REVIEW.

1. May a petitioner for a writ of certiorari ask this Court to review the judgment of a state court if he has failed to comply with that portion of section 1 (f) of Rule 23 of the Revised Rules of this Court which require him to specify the stage in the proceedings in the state courts, and the manner, in which the federal question was timely and properly raised?

2. May a state court enjoin a union from picketing where there is danger to life, limb or property even though an unfair labor practice charge has been filed with the National Labor Relations Board by the union?

3. May a state court issue a temporary order restraining members of a labor union from violating a no-strike clause in a collective bargaining contract between the union and the employer-corporation even though an unfair labor practice charge has been filed by the union with the National Labor Relations Board?

4. May a state court, when presented with a case, determine whether it has jurisdiction to proceed; and while it is considering such question issue an order which counsel

must obey even though it may be decided thereafter that such court actually had no jurisdiction to hear the case on the merits?

5. After an attorney for one of the parties to an action in a state court has admitted in open court that he has advised his client to disobey an order made by such court and that he will continue so to advise his client, may such court summarily find him to be guilty of contempt; and, at a later hearing wherein such attorney is himself represented by counsel, impose sentence upon him, without impairing his constitutional rights?

STATEMENT OF THE CASE.

On May 26, 1960, Toledo Marine Terminals, Inc. (the employer) entered into a collective bargaining contract with Local 1317-A of the International Longshoremens Association (the Union) (R. 13-15). Such Local 1317-A had been certified as the bargaining representative of the employees (R. 17, bottom). The agents who signed the contract on behalf of the union had authority to do so (R. 17-18). Although the opening paragraph refers to May 24, 1960 (R. 13), the contract actually was signed on May 26 (R. 15). On June 7, the petitioner's counsel admitted that an unfair labor practice charge growing out of an alleged breach of such contract was pending before the National Labor Relations Board (R. 45). This contract contained a "no-strike" clause (R. 11, top three lines). On May 27, 1960, the union began to picket the employer's place of business. The employer immediately filed in the Court of Common Pleas of Lucas County, Ohio, a petition in which, among other things, it alleged danger to life, limb and property (R. 11). It asked for a temporary restraining order to forbid such picketing,

pending a final hearing, at which time such temporary restraining order should be made permanent (R. 11-12). Service was made upon the representatives of the union (R. 18-19). The court issued such restraining order (R. 18). The union disregarded the order and continued to picket the premises (R. 19).

On June 1, the Court of Common Pleas, which is a court of general jurisdiction (R. 67, bottom), conducted a hearing to determine whether the union officials were guilty of contempt for violating the restraining order (R. 17 et seq.). In the course of the hearing, the present petitioner, Merritt W. Green II, who was the attorney for the union, objected to the jurisdiction of such court since he said that an unfair labor practice charge had been filed with the National Labor Relations Board (R. 19). In response to questions by the court, the petitioner said that the union had been told by him to violate the "no-picketing" order of the court (R. 23). He explained to the court that if the union had obeyed the order and waited to have the whole matter determined on a final hearing, the union officials would have had to give up the only vital right they had to bargain (R. 24, bottom).

The hearing was continued until June 3. On that day in response to questioning by the court, the petitioner again admitted to the court that he himself had advised his clients to violate the "no-picketing" order (R. 27). The court then told him that he was in contempt (R. 28). The petitioner answered as follows: "Your Honor, I have taken the only course open to me, but I don't feel that we are in contempt of Court. I don't want to discuss that at this time, I am not concerned with that at all" (R. 28).

On June 6, the court filed a Charge in Contempt against the petitioner, reciting that he had advised his clients to disobey the restraining order, that they, acting

on his advice and counsel, had violated the order, and that the petitioner, after being notified by the judge in open court that he was in contempt of court, "did and does continue" to advise the union officials to continue to disobey the order (R. 29-30).

On June 7, the court conducted a hearing upon the proceeding in contempt against the petitioner (R. 30 *et seq.*). Such hearing did not concern the union officials.

At this hearing the petitioner was represented by counsel. [NOTE two things, namely, 1. When the stenographer refers to "Mr. Green" on the occasion of this June 7 hearing, he means Mr. Merritt W. Green, the father of the petitioner, and one of the petitioner's counsel. When he refers to "Mr. Green" on the occasion of other hearings, he means Judge Merritt W. Green II, who is the petitioner in this present proceeding on certiorari. 2. Throughout the hearing on June 7, Merritt W. Green II, the petitioner in this present proceeding on certiorari, was referred to as "the respondent" since he was the respondent in the contempt proceedings, which were separate and distinct from the habeas corpus proceedings.] The court refused to allow the petitioner to testify on June 7, but, at the request of his counsel (R. 35), allowed his counsel to read a prepared statement which included what the petitioner would have testified if he had been permitted to take the stand (R. 34-45). In this statement, the petitioner told in detail of the various steps which had culminated in the Charge in Contempt. Nowhere in such statement did he deny that he had advised the union officials to violate the order. On the contrary, he said that at a meeting between the judge, the respondent and the respondent's associate, the associate had told the judge that "regardless of the private opinions of the court respecting the validity of the contract that the court had no jurisdiction over this

matter and that he was forcing us to advice (sic) our clients * * * of their rights not to obey the order" (R. 40, center; 67, top). He also told the judge on another occasion "that the position of the union was that the persons who signed the agreement had no authority to do so and further suggested that the court had no jurisdiction" (R. 38, lower half of page). Among other matters, he said that he had received a telephone call from counsel for the union at its headquarters in Chicago, telling him that the heads of the union had decided to continue picketing notwithstanding the court order. In the words of the petitioner, he "thereupon called the union hall and told them of the decision of the officials and asked them to communicate this information to the pickets" (R. 41, bottom). In his statement, the petitioner said that he had told the court that he had a motion to vacate the restraining order prepared and would file it immediately if he could obtain an early hearing, but that the court had refused to hear the motion until the restraining order was obeyed (R. 43). At the end of this June 7 hearing, the court fined the petitioner $500 and also sentenced him to confinement for ten days in the Lucas County Jail (R. 46).

On June 7 the petitioner filed a petition for habeas corpus in the Ohio Court of Appeals, Third District, sitting in Lucas County, Ohio. On November 1, 1960, the petitioner's release was denied by the Court of Appeals (R. 48, 55). On November 18, he filed notice of appeal to the Ohio Supreme Court (R. 48). On May 17, 1961, the Ohio Supreme Court affirmed the judgment of the Ohio Court of Appeals, thereby deciding that the sentence for contempt was valid. (R. 61, 69). Thereafter the petitioner filed his present petition for a writ of certiorari in this Court (R. 71), which granted the writ on November 6, 1961.

In his oral argument before the Common Pleas Court on June 1 and June 3, 1960, the petitioner questioned the jurisdiction of such court to issue the restraining order, giving as his reason his statement that an unfair labor practice charge had been filed by the union with the National Labor Relations Board (R. 19-20; See also R. 24, 26). In the oral argument on June 7, counsel for the petitioner raised the same objection to the jurisdiction of the court (R. 33, 45). In the petitioner's written statement which his counsel was permitted to read during the hearing on June 7, the petitioner raised the same objection to the jurisdiction of the court (R. 37-38, 41-44).

There is nothing to indicate that the petitioner at any time during the hearings in the Common Pleas Court on June 1, June 3 and June 7, ever raised the question of "due process" with respect to the way in which his own "contempt of court" hearings were being conducted in such court. It should be remembered that such proceedings in the Common Pleas Court were part of the original cause No. 188631, *Toledo Marine Terminals, Inc. v. I. L. A. Local 1317-A,* (R. 3, bottom; R. 8 *et seq.*). They had nothing to do with the proceedings in Habeas Corpus which this Court is now reviewing and which was begun in the Ohio Court of Appeals and not in the Common Pleas Court.

During the hearing on June 9, 1960, before the Ohio Court of Appeals upon the petitioner's application for a writ of habeas corpus, the record shows that in the course of his oral argument, he again raised the question of lack of jurisdiction of the Ohio court to issue the restraining order (R. 3-5). He did not raise any question as to whether his own "contempt of court" case had been conducted so as to deprive him of his constitutional right to due process of law (R. 2-7).

The respective opinions of the Ohio Court of Appeals (R. 48-55) and of the Ohio Supreme Court (R. 63-69) indicate that the defenses of lack of jurisdiction to issue the restraining order and of due process of law were raised somewhere along the line. Neither opinion gives any indication as to how, when or where either of these defenses was raised.

The charge of "unfair labor practices" which had been filed with the National Labor Relations Board and which was the basis of the petitioner's objection to the jurisdiction of the Common Pleas Court, contained only vague charges that the employer had refused to bargain collectively, although in fact negotiations had been under way almost continuously (R. 3). Such "unfair labor practices" charge was not based upon the collective bargaining agreement between the employer and the union (R. 3). Such unfair labor practices charge had already been dropped prior to the first habeas corpus hearing on June 9 (R. 3).

The Common Pleas Court on June 3, when it found the petitioner guilty of contempt, told him that he ought to select a lawyer to represent him and that if he did not do so, the court would appoint one (R. 28-29).

SUMMARY OF ARGUMENT.

I.

Since the petitioner has not specified, in his statement of the case the stage in the proceedings or the manner in which either of his federal objections (i.e. (1) lack of jurisdiction in the state court because of charges before the National Labor Relations Board; and (2) failure by the trial court to protect his constitutional right to "due process of law" in the contempt proceedings), he has therefore failed to comply with the requirements of section 1 (f) of Rule 23, Revised Rules of this Court. Therefore this Court should refuse to consider either of such objections at this time and should not permit the petitioner to argue upon either question.

II.

Even though an unfair labor practices charge has been filed with the National Labor Relations Board, a state court may enjoin picketing where there is danger that it will result in danger to life or limb or damage to property. *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131.

III.

The state court did not lose its jurisdiction to forbid the violation of the "no-strike" clause in the collective bargaining contract simply because an unfair labor change had been filed with the National Labor Relations Board. Congress has never taken away from the states the power to enforce such a contract. Breach of such a contract is not an "unfair labor practice." Authority to settle a dispute concerning such a contract has not been vested in the National Labor Relations Board. *Association of Westinghouse Employees v. Westinghouse Electric Corporation*, 348 U. S. 437, footnote 2 on pages 443-444.

IV.

A court of general jurisdiction has a right to determine its own jurisdiction in a given case. When at the beginning of an action it issues a temporary order, the parties before the court, including the attorneys, must obey such order, even if such order is later found to be beyond the jurisdiction of the court. This doctrine applies to any court, state as well as federal. *Howat v. Kansas*, 258 U. S. 181.

V.

An attorney who, in open court, tells the court that he has already advised his client to violate an order of the court and that he intends to continue giving such advice, is guilty of direct contempt and may be punished summarily by the court. *Sacher v. United States*, 343 U. S. 1. But even if his contempt be considered to be indirect, he has not been deprived of his constitutional rights under the facts of this case. The cases of *Cooke v. United States*, 267 U. S. 517, *Re Oliver*, 333 U. S. 257, and *Re Murchison*, 349 U. S. 133, are distinguished.

ARGUMENT.

I.

NON-COMPLIANCE WITH RULE 23, REVISED RULES.

Section 1(f) of Rule 23 of the Revised Rules of this Court reads in part as follows, namely,

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

The petitioner bases his claim upon two federal questions, namely,

> 1. Whether the power of a state to issue an order restraining the picketing of an employer has been curtailed by Congress and such power vested in the National Labor Relations Board; and
>
> 2. Whether under the facts of this case he has been denied due process when he was summarily adjudged to be in contempt of court.

According to the above Rule 23, he should have specified in his statement of the case the stage, the manner and the method, in the proceedings in the court of first instance (the Ohio Court of Appeals) and in the appellate

court (the Ohio Supreme Court) at and in which each of these questions was raised.

He has shown none of these things in his brief with respect to the due process question. With respect to the question of the conflict of jurisdiction between the state court and the National Labor Relations Board, his brief shows that in the initial hearing before the Ohio Court of Appeals (the court of first instance) upon his petition for a writ of habeas corpus, he orally raised such point (Brief 6, 19). His brief is silent as to how or when he raised this question in the Ohio Supreme Court, which was the appellate court which reviewed his petition for a writ of habeas corpus. It should be remembered that this Court is now reviewing only the Habeas Corpus case, which is collateral to and not a part of the original proceedings in contempt.

The above portion of Rule 23 is not a recent invention of this Court. It simply restates what has long been settled by judicial decision, namely, that a litigant who wishes an upper court to review a case which he has lost in the lower court shall be limited in his argument to points which he raised in the lower court. "The benefits of hypothetical defenses, never raised below or pressed upon us are not to be involved in the abstract." *Beauharnais v. Illinois*, 343 U. S. 250. Furthermore, the burden of establishing these matters rests affirmatively upon the petitioner. *Republic Natural Gas Co. v. Oklahoma*, 334 U. S. 62.

Since the petitioner has not complied with the foregoing Rule 23, this Court should not permit him to offer any argument, whether by means of his brief or orally, upon either of these federal questions.

II.

A. A State Court May Enjoin Picketing Where There is Danger to Life, Limb or Property Even Though an Unfair Labor Practices Charge Has Been Filed With the National Labor Relations Board.

The basic principle that a state court may enjoin picketing to prevent violence or mass picketing, is admitted by the petitioner on pages 24 and 43 of his brief. He cites *Union Carpenters Local v. Laburnum*, 347 U. S. 656; *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131, and *United Automobile Workers v. Russell*, 356 U. S. 634 (not *United Oil Workers v. Rochelle*, 356 U. S. 656, as appears on page 43 of his brief).

The only difference of opinion with respect to these cases lies in the difference of the meaning of "violence."

B. A Court Need Not Wait Until Violence Breaks Out Before it Issues Injunction.

The employer, the Toledo Marine Terminals, Inc., in its original petition against the union, alleged that unless the court were to issue an injunction, the picketing would "result in danger to life and limb of the employees of plaintiff company and irreparable loss and damage to property of plaintiff company" (R. 11).

This is enough to justify the court in taking preventive steps. It is better to prevent violence from erupting than to stand by until it has broken out. The petitioner contends that "the petition upon which the ex parte injunction was issued did not contain an allegation of one fact relating to mass picketing or picketing accompanied by violence or intimidation" (Petitioner's Brief, 40). That is true, but it is probably true only because the restraining order anticipated such violence and prevented it from happening.

When confronted with a situation like the one which existed at the beginning of the employer's action against the union, a court must exercise its sound discretion to determine whether the complaining employer is entitled to ex parte relief. That does not mean that the jurisdiction of the court falls to the ground if the court guesses wrong. In the nature of things, the court must determine then and there at the outset of the employer's action whether to issue a restraining order. The only way in which it can make an intelligent determination is to survey the facts as they appear at that moment, and to make its own estimate of the situation. If such survey convinces the court that violence is reasonably likely to occur, then the court has a right to issue the order. This right is not destroyed retroactively when at a later date the court looks back and sees that the violence never happened after all.

As a matter of fact, no one can show at this late date that the trial court did make a mistake when it issued the original restraining order. It is perfectly reasonable to say that the restraining order prevented the violence from happening, and that had no order been issued, violence would have happened.

III.

A. A State Court May Enforce a Collective Bargaining Contract.

Since Congress has never authorized the National Labor Relations Board to enforce a collective bargaining agreement, the state courts retain jurisdiction over it as they do over any ordinary contract.

> "It is significant, however, that breach of contract is not 'an unfair labor practice'. A proposal to that end was contained in the Senate bill but was deleted in conference with the observation: 'Once parties have

made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board.' (H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42)." *Association of Westinghouse Employees v. Westinghouse Electric Corp.*, 348 U. S. 437, footnote 2 on pages 443-444.

The above quoted *Westinghouse* case was decided in 1955. That this Court saw no reason later to modify the above quotation may be shown by the fact that as late as June 22, 1959, this Court denied a writ of certiorari to review the decision of the Supreme Court of Minnesota in a case involving the same basic issue. In *McLean Distributing Company v. Brewery and Beverage Drivers Local*, 254 Minn. 204, 94 N. W. 2d 514, 521, the Minnesota Supreme Court said:

> "A strike in violation of a contract not open to renegotiation during its term is not an unfair labor practice under the National Labor Relations Act. It is declared to be such under M. S. A. sec. 179.11(1). A number of state courts have held that under conditions such as we have here the state may entertain jurisdiction." (Citing cases.)

Had this Court felt that the above words of the Minnesota Supreme Court were wrong, it could have reviewed the *McLean* case by means of certiorari. The fact that it denied the writ as late as 1959, in 360 U. S. 917, indicates that it considered such quotation to be a fair statement of the law.

B. The Present Collective Bargaining Contract Bound the Union.

Since the record contains nothing to indicate any defect in the execution, the form or the contents of the collective bargaining contract between the employer and the union, it must be accepted as valid and binding upon both parties. The skeleton of the contract is set forth in the Record (R. 13-15). It was executed on May 26, 1960, between two parties, namely, Toledo Marine Terminals, Inc. (the Company) and The International Longshoremen's Association AFL-CIO, Local 1317-A (the Union) (R. 15). It was signed by each of the two parties by means of their respective human representatives. At the end of the document in the place reserved for signatures of the parties, the record indicates that a third name was printed, namely,

> "The International Longshoremen's Association, AFL-CIO
> By (Not signed)

No explanation appears in the record why this third unsigned name appears but that is immaterial since only the certified bargaining representative is a necessary party. *National Labor Relations Board v. Borg-Warner Corp.*, 356 U. S. 342, 350. The International Longshoremen's Association, AFL-CIO, was not a party to the contract (R. 13, top). Therefore an unfilled blank signature of its name was mere surplusage. The contract was between the certified bargaining representative, Local 1317-A of the International Longshoremen's Association, and Toledo Marine Terminals, Inc. (R. 13, top; 17, bottom). No third party, such as the National Headquarters of the Association, was involved. Nowhere is there anything in the record to indicate that the National Headquarters of the union

had anything to do with the contract. The petitioner states that the contract was not a completed contract but does not explain his meaning (Petitioner's Brief, 4, 44). The record, on the contrary, shows that it was complete since it was signed by the only two persons who were parties to it, namely, Toledo Marine Terminals, Inc. (the employer) and Local 1317-A (the union). Furthermore, there is nothing in the record to show that the signing was *ultra vires* as to either party or that the agents of either party lacked authority to sign the names of their respective principals, although the petitioner makes an unsupported charge to that effect in the prepared statement which his counsel read at the hearing on June 7 (R. 38, lower part of page). On the contrary, they had authority to sign on behalf of the union (R. 18).

C. Since Congress Never Deprived the Ohio Court of Its Jurisdiction to Enforce Such a Contract, the Restraining Order Was Valid Even Though the Picketing Was Peaceful. The Petitioner's Citations Are Not in Point.

What has been said under parts A and B of this Argument III, necessarily leads to the conclusion that the Ohio court could restrain a threatened breach of this contract even though such breach did not involve any violence, intimidation or mass picketing.

The petitioner cites a number of cases in support of his contention that a "State Court Has No Jurisdiction Where Labor Dispute is Arguably or Potentially Subject to National Labor Relations Board Jurisdiction" (Petitioner's Brief, 42 *et seq.*) None of these cases is in point, in that none involves enforcement of a collective bargaining contract.

Union Carpenters Local v. Laburnum, 347 U. S. 656, was essentially a tort action for damages because of vio-

lence growing out of an attempt by the union to organize the workers. No collective bargaining contract was involved.

Youngdahl v. Rainfair, Inc., 355 U. S. 131, did not involve any collective bargaining contract. The state court had authority to enjoin violence growing out of an attempt by union to organize the workers but it went too far when it enjoined peaceful picketing.

Automobile Workers v. Russell, 356 U. S. 634 (not *United Oil Workers v. Rochelle*, 356 U. S. 656, as it appears on page 43 of petitioner's brief) was essentially a tort action for damages because of threats of violence and mass picketing. No collective bargaining contract was involved.

Garner v. Teamsters, Local No. 776, 346 U. S. 485, did not involve any collective bargaining contract. A Pennsylvania court had no jurisdiction to enjoin peaceful picketing.

Weber v. Anheuser-Busch, Inc., 348 U. S. 468 (not 348 U. S. 478, as appears on page 43 of petitioner's brief) did not involve any such contract. A Missouri court had no right to enjoin a peaceful strike which grew out of a dispute between two unions.

Guss v. Utah Labor Relations Board, 353 U. S. 1, involved the power of the National Labor Relations Board to decline to exercise jurisdiction. No collective bargaining contract was involved.

Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U. S. 20, did not involve any collective bargaining contract. The Ohio court had no right to enjoin peaceful picketing.

San Diego Building Trades Council v. J. S. Garmon is in two decisions, 353 U. S. 26 and 359 U. S. 236. Both

are important cases, especially the second one; but they do not involve any collective bargaining contract. A California court had no right to enjoin peaceful picketing or to award damages. The case grew out of an attempt by a union to organize the workers.

In like fashion none of the earlier cases which the petitioner cites on page 41 or 42 of his brief discusses the effect of a collective bargaining contract upon the matter of state jurisdiction. *Amalgamated Association v. Wisconsin Board*, 340 U. S. 383, simply grew out of a state statute which abrogated the right to strike against public utilities. *La Crosse Telephone Corporation v. Wisconsin Board*, 336 U. S. 18, declared that a state board might not exercise jurisdiction to determine the appropriate bargaining representative of employees whose employer was engaged in interstate commerce. *Bethlehem Steel Company v. New York Board*, 330 U. S. 767, laid down the rule that foremen who were unable to organize under the federal statute because of a policy of the National Labor Relations Board, could not do so under a state statute. *Plankington Packing Company v. Wisconsin Board*, 338 U. S. 953, contained a *per curiam* memorandum wherein this Court reversed the lower court on the authority of the *La Crosse* case and the *Bethlehem Steel case*, above cited, without further explanation. *Hill v. Florida*, 325 U. S. 538, declared that Florida lacked authority to require that business agents of labor unions be licensed by the state.

It thus appears that all of the cases cited on pages 41-44 of the petitioner's brief have this in common:

> They did not involve any enforcement of a collective bargaining contract.

They therefore are inapposite and have no value as support for his contention that in the present case the Ohio

court had no jurisdiction to enjoin picketing which violates such a collective bargaining contract.

In the present case, there was such a contract and it contained a "no-strike" clause (R. 11, top). The petitioner himself admitted in open court that the original action was brought by the employer against the union to enforce such "no-strike" clause (R. 19). He further admitted on June 7 through his counsel, that an unfair labor practice charge arising out of an alleged breach of this contract was then pending before the National Labor Relations Board (R. 45). Since the enforcement of such a clause has never been vested by Congress in the National Labor Relations Board, but remains where it always was, namely, in the States themselves, therefore the Ohio court had jurisdiction to issue the restraining order.

An excellent discussion of the foregoing subject may be found in an annotation to *McCarroll v. Los Angeles District Council*, 49 Calif. 2d 45, 315 Pac. 2d 322, certiorari denied on January 27, 1958, 355 U. S. 932, which appeared in the University of Pennsylvania Law Review for May, 1958, (106 *U. of Pa. L. R.*, 1070), entitled: "State Court may grant specific performance of no-strike clause under Section 301 (a) of Taft-Hartley Act." See also "Reflections upon Labor Arbitration" by Archibald Cox, 72 *Harvard Law Review*, 1482 at 1485.

IV.

THE OHIO COURT, WHEN ASKED TO ISSUE A RESTRAINING ORDER, HAD A RIGHT TO DETERMINE ITS OWN JURISDICTION. PENDING SUCH DETERMINATION, THE PETITIONER WAS OBLIGED TO OBEY SUCH ORDER.

The leading case on this point is *United States v. Shipp*, 203 U. S. 563. On page 573, this Court said:

> "But even if the Circuit Court had no jurisdiction to entertain Johnson's petition, and if this Court had no jurisdiction of the appeal, this Court, and this Court alone, could decide that such was the case. It and it alone necessarily had jurisdiction to decide whether the case was properly before it * * *. Until its judgment declining jurisdiction should be announced, it had authority from the necessity of the case to make orders to preserve the existing conditions and the subject of the petition * * *."

After the *Shipp* case, this Court reiterated the rule that a court has authority to decide whether it has jurisdiction in this kind of a situation, and that pending such decision people must obey its orders. *Toy Toy v. Hopkins*, 212 U. S. 542, 548; *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 450. The *Shipp* case was decided in 1906. That it continued to represent the rule of this Court may be seen from *United States v. United Mine Workers of America*, 330 U. S. 258, decided in 1947. In this latter case, on page 291, this Court quoted with approval the above passage from the *Shipp* case.

The petitioner, on pages 35 to 39 of his brief, argues that neither the *Shipp* case nor the *United Mine Workers* case is controlling in the present situation. He argues that they are limited to a situation wherein the court has jurisdiction over the subject matter and issues an injunc-

tion which is only ancillary to the main relief sought. That the petitioner is wrong in thus limiting the decisions in the *Shipp* case and the *United Mine Workers* case is clearly shown by the case of *Howat v. Kansas*, 258 U. S. 181, decided in 1922. The petitioner does not mention the *Howat* case, although this Court, in the *United Mine Workers* case (330 U. S. 258 at 293), quoted with approval the following long passage from the *Howat* case, namely,

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished" (258 U. S. 181, on pages 189-190).

This quotation appears on pages 189-190 of 258 U. S. It is quoted with approval in the *United Mine Workers* case on page 293 of 330 U. S.

The limitations which the petitioner suggests on pages 35 to 39 of his brief, do not exist in the *Howat* case. The *Howat* case grew out of a sentence for contempt imposed by a Kansas state court. The state court had issued an injunction to prevent a general coal strike which would have violated Kansas state law. A violation of such injunction caused such Kansas court to impose a sentence for contempt. The Kansas Supreme Court affirmed such

sentence. This Court approved the action of the Kansas Supreme Court in the above quoted passage.

In the present case, the Ohio court actually did have jurisdiction to issue the initial restraining order and therefore the precedent of the *Howat* case is unnecessary. The plaintiff prayed "that upon final hearing said restraining order be made permanent" (R. 12, bottom). The plaintiff's petition was verified, i.e., sworn to (R. 65, center). But even if the Ohio court had lacked jurisdiction to issue such order because it had been vested in the National Labor Relations Board, the above language of the *Howat* case would have applied to the present case.

Here, as in the *Howat* case, the court was a court of general jurisdiction with equity powers (R. 63, second headnote, together with the rest of the opinion of the Ohio Supreme Court in this proceeding). The pleadings properly invoked its action (R. 8-12). The parties were served and were before the court (R. 18-19). The agents of the union local who signed the contract on its behalf had authority to do so (R. 17-18). The local was the certified bargaining representative (R. 17, bottom). When the Ohio Court issued the restraining order, it was entitled to demand obedience from the petitioner. Under such circumstances, its order

> "* * * must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case." (Part of the above quotation from the *Howat* case. This quotation is to be found beginning on page 189 of 258 U. S.)

Because of the foreging factual similarity to the *Howat* case, the rule of the *Howat* case applies in the present pro-

ceeding. Here, as in the *Howat* case, the order of the trial court must be obeyed until reversed, either by itself or by a higher court. Here, as in the *Howat* case, disobedience of such order is contempt of court and may be punished as such.

V.

A. An Attorney Who Advises His Client to Violate an Order of a Court Is Guilty of Contempt.

As stated above, the rule is beyond question. A lawyer may not be an officer of the court within the peculiar meaning of 18 United States Code (1952) 401(2) as stated in *Cammer v. United States*, 350 U. S. 399, but he certainly is an officer of the court in the usual and traditional meaning of that phrase. As such he is held to a high degree of responsibility in his conduct toward the court and in obedience to its orders.

B. Although an Attorney May Give a Bona Fide Opinion as to the Validity of a Court Order, He May Not Advise His Client to Violate Such Order.

The distinction between the act of a lawyer in telling his client in good faith that in his opinion, an order of a court is invalid, and the act of a lawyer in telling the client to go ahead and violate the order, is well established in many states. Some of the cases are collected in an annotation entitled "Liability of the Lawyer for Advising Disobedience" in 39 *Columbia Law Review* 433 (1939) at footnotes 16 and 66. The Ohio Supreme Court adopts such distinction in its opinion in the present case (R. 69, top).

A distinction of this kind is one which lies within the power of each state acting through its courts and/or legislature, to adopt if it so desires.

C. The Petitioner Advised Disobedience of the Order and Repeated the Same in Open Court. He was Guilty of Direct Contempt.

That he gave such advice is clearly admitted by him, not once but several times.

On June 1 the court asked the respondent whether the union officials had been told by some one to violate the court order and he answered:

> "I can advise the Court now that they were told by me" (R. 23).

Later at the same hearing the court said:

> "You could wait until we had a final hearing on the entire matter; that was the only way you could have done it; you could obey the order of the Court" (R. 24).

In answer, the petitioner said:

> "No, we could not have done it that way. Then my client would have had to give up the only vital right they had to bargain. The only other way this matter could have come up is the way it did come up, that is, by a contempt action in this Court, because this is the only way this matter could have been heard" (R. 24).

On June 3, at a resumption of the same session, the court said:

> "You also advised them to violate an order of the Court, too" (R. 27).

The petitioner answered:

> "I did" (R. 27).

After a few lines of discussion concerning another matter, the court said:

> "All right, now, I will—we will proceed from there. It is very apparent from what you have said here this

morning that you are in contempt of Court. Now, I will give you until next Tuesday to purge yourself of contempt of Court, and you may select a lawyer of your own choosing; if you don't select a lawyer of your own choosing, I will appoint an attorney for you to represent you. I don't want you representing yourself. (R. 28).

Shortly thereafter the petitioner said:

"Your Honor, I have taken the only course open to me, but I don't feel that we are in contempt of Court. I don't want to discuss that at this time; I am not concerned with that at all" (R. 28, lower half).

The Charge in Contempt which the judge filed on June 6, 1960, stated, among other things:

"Whereas, one Merritt W. Green, II, legal counsel for the defendants, did with full knowledge of said restraining order, advise and counsel said defendants to disobey said order; and

"Whereas said defendants and others, acting on the advice and counsel of said Merritt W. Green, II, did disobey said order by continuing picketing at or near the vicinity of the premises of the plaintiff at 26 Main Street, Toledo, Ohio, and

"Whereas, said Green, after being notified in open Court by the undersigned, that he was in contempt of Court did and does continue to advise the said defendants to continue to disobey said order of the Court;

"Said Green is hereby charged with being in contempt of Court and a hearing thereon is set for June 7, at 10:30 o'clock, a. m., and the clerk is instructed to enter this charge on the journal of the Court" (R. 29-30).

During the hearing on June 7, counsel for the petitioner asked for permission to read a statement by the petitioner (R. 35). The court granted such permission (R.

36). In his statement the petitioner said, among other things, that at a meeting between the trial judge and the petitioner and the petitioner's associate, the associate told the judge that regardless of the private opinion of the court respecting the validity of the contract, the court had no jurisdiction and that he was forcing the petitioner and the latter's associate to advise their clients "of their rights not to obey the order." The judge "replied that in such an event that they would be cited for contempt" (R. 40, center of page; see also R. 67, top). The context indicates that when the petitioner heard his associate say these words to the judge, the petitioner approved of them and accepted them as his own.

From the foregoing passages taken from the record, it is manifest:

1. That the respondent clearly and unequivocally admitted in open court that he had advised his clients to violate the order, knowing well that he ran a risk of being cited for contempt; and

2. That he defiantly told the judge in open court that

> "Your Honor, I have taken the only course open to me, but I don't feel that we are in contempt of Court. *I don't want to discuss that at this time, I am not concerned with that at all.*" (R. 28, emphasis supplied.)

His last sentence "I don't want to discuss that at this time, I am not concerned with that at all," showed a contumacious defiance in open court of the court's authority. The plain meaning of his words, taken in the light of their context, indicates that he did not care what the court thought and that he, the respondent, intended to continue to defy the court. This in itself was *direct* contempt, committed in open court. These words alone were sufficient grounds

for the court to adjudge him guilty of direct contempt on the spot, without further formality or hearing (*Ex parte Terry*, 128 U. S. 289; *Sacher v. United States*, 343 U. S. 1). This alone should be enough to cause this Court to dispose of this case by affirming the judgment of the Ohio Supreme Court.

D. The Purpose of the Petitioner in His Contemptuous Acts Was to Force the Court to Grant an Immediate Hearing on the Restraining Order.

When the petitioner advised his clients to disobey the court order, he was not acting blindly nor was he moved by sudden and unreasoning passion. He had discussed the matter with other counsel for the union before he reached his decision (R. 37). In an apparently informal discussion between the trial judge, the attorney for the employers, and the petitioner himself, the petitioner told the judge that he had a motion to vacate prepared and would gladly file it immediately *if he could obtain an early hearing.* (Emphasis added.) In the language of the statement which the petitioner's counsel read on June 7, 1960, "The court flatly refused saying that he would not hear the motion until the restraining order was obeyed. I then asked (the court) that if the restraining order was obeyed would it be possible to obtain a hearing within the week and he replied that it would not" (R. 43, lower half of page).

At the hearing on June 1, the following dialogue between the petitioner and the court occurred, namely,

> "The Court: You could at least obey the order of the Court and then come in and express whatever criticism you had and purge yourself.
>
> "Mr. Green: There were only two ways we could do this.
>
> "The Court: You could wait until we had a final hearing on the entire matter; that was the only way

you could have done it; you could obey the order of the Court.

"Mr. Green: No, we could not have done it that way. Then my clients would have had to give up the only vital (fol. 30) right they had to bargain. The only other way this matter could have come up is the way it did come up, that is, by a contempt action in this Court, because this is the only way this matter could have been heard. I will say to this Court that on Friday after the hearing of the Board of the International Longshoremen's Association in Chicago, where they were negotiating this matter, I explained the entire situation to them and they were reluctant to give up their rights as far as their economic rights were concerned and it was apparent that this Court had made a Court order that was invalid on its face.

"The Court: But that was before it was ever submitted into Court you did that.

"Mr. Green: Oh, there is no question about that" (R. 24-25).

At the hearing on June 7, in the course of the petitioner's prepared statement, he told about calling one of the counsel of the International Longshoremen's Association in Chicago on the long-distance telephone. The Petitioner said:

"I then told him that if we were correct on the law that the order of the court was wholly invalid then the only alternative would be to defy the order of the court in the hopes that Mr. Ragan would file contempt proceedings which would undoubtedly be heard immediately and from which we could instantly appeal to the Court of Appeals to determine the jurisdiction of the court" (R. 41). (NOTE: The Mr. Ragan to whom reference is made is Robert C. Ragan, Esq., an attorney for Toledo Marine Terminals, Inc. (R. 12).)

The foregoing passages in the record show that the petitioner knew what he was doing when he advised his

clients to disobey. He did not act blindly but took a calculated risk. Therefore he is not entitled to any leniency such as might well be shown to a lawyer who without deliberation temporarily forgot the respect which he owed to the Court. Mere hot-headed impudence would have been bad enough. Cold-blooded contempt, committed in the course of tactics designed to coerce the court into granting an immediate hearing, is far worse.

E. Since the Petitioner Was Guilty of Direct Contempt, the Court Had Authority to Punish Him Summarily.

This Court has long recognized the right of a court to punish summarily a person guilty of direct contempt, that is, contempt committed in open court. The above quoted passages from the record and particularly the one in which the petitioner said:

> "Your Honor, I have taken the only course open to me, but I don't feel that we are in contempt of Court. I don't want to discuss that at this time, I am not concerned with that at all" (R. 28),

show clearly that the petitioner was not merely admitting that he had committed an indirect contempt away from the court; they also show that he was defiantly repeating the same in the courtroom itself; that he was trying to justify his conduct; that he was unwilling to discuss the matter with the court; and that he was not concerned with the matter at all.

The Ohio Court of Appeals clearly indicated that the petitioner's contempt was direct (R. 53, bottom).

Under such circumstance, the Court had ample authority to find him guilty of contempt then and there, without further formality or hearing. Ex parte *Terry*, 128 U. S. 289; *Sacher v. United States*, 343 U. S. 1.

F. Even if the Petitioner Were Guilty of Only Indirect Contempt, the Court Did Not Deprive Him of His Constitutional Rights When It Found Him Guilty and Sentenced Him. Cooke v. United States, 267 U. S. 517, Re Oliver, 333 U. S. 257, and Re Murchison, 349 U. S. 133, Are Distinguished.

The petitioner in his brief quotes a number of cases in support of his contention that the trial court deprived him of his constitutional rights when it found him guilty of contempt. Most of them were cases of ordinary criminal prosecutions and therefore did not present the problems which are peculiar to cases of contempt of court. Three cases, however, stand out since they did involve contempt. They are *Cooke v. United States*, 267 U. S. 517, *Re Oliver*, 333 U. S. 257 and *Re Murchison*, 349 U. S. 133. None of them applies to the present situation.

Cooke v. United States, 267 U. S. 517, decided in 1925, grew out of a letter which a lawyer, with the assistance of his client, sent to the judge before whom the lawyer was appearing in a series of cases involving the client. The letter accused the judge of bias. The client handed the letter to the judge in chambers. Eleven days later, the court caused both men to be arrested and brought into court. The judge immediately and summarily found them guilty and sentenced them. This Court subsequently decided that they had been deprived of their constitutional rights. After discussing the power of a judge to punish summarily where the contempt is committed in open court, this Court said, beginning on page 536:

> "When the contempt is not in open court, however, there is no such right or reason in dispensing with the necessity of charges and the opportunity of the accused to present his defense by witnesses and argument. The exact form of the procedure in the

prosecution of such contempts is not important. The court in *Randall v. Brigham*, 7 Wall. 523, in speaking of what was necessary in proceedings against an attorney for malpractice, said:

"'All that is requisite to their validity is that, when not taken for matters occurring in open court in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense. The manner in which the proceedings shall be conducted, so that it be without oppression or unfairness, is a matter of judicial regulation.'

"The court in *Savin, Petitioner*, 131 U. S. 267 applied this rule to proceedings for contempt.

"Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think that this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed" (266 U. S. 517, 536).

In the case now pending, the petitioner has received all the rights above listed or their substantial equivalent.

As to the charge of contempt, the petitioner knew from the beginning that his act would be contemptuous. He actually committed the act (by advising his clients to disobey the order) for the purpose of inviting a proceeding in contempt (R. 24, 25, 41).

He was given an opportunity to meet the charge by defense or explanation; but instead of meeting the charge, he told the court,

" I don't want to discuss that at this time, I am not concerned with that at all" (R. 28).

He was given an opportunity to be represented by counsel. In fact the court told him, "if you don't select a lawyer of your own choosing, I will appoint an attorney for you to represent you" (R. 28). At the hearing on June 7, he was represented by two counsel (R. 31).

At no time did the petitioner indicate that he wished to call any other witness. Although he was not permitted to take the stand in person on June 7 (R. 34), the court allowed his counsel to read into the record a prepared statement which covered everything the petitioner would have said if he had taken the stand (R. 35-45). The petitioner's own counsel asked for permission to read such prepared statement (R. 35). He thereby waived any objection to the refusal of the court to allow the petitioner to testify in person and cured any harmful consequences which might have been caused by such refusal. Indeed, there never was any dispute as to the facts in this case. The whole contempt proceeding rests upon what the petitioner voluntarily said in open court.

Because of the foregoing facts, the petitioner has received substantially all of the rights to which he was entitled according to *Cooke v. United States*, 267 U. S. 517.

The two later cases of *Re Oliver*, 333 U. S. 257, and *Re Murchison*, 349 U. S. 133, did not involve a lawyer who admitted his own contempt voluntarily in open court and then tried to justify it. Both of them arose under two successive versions of the Michigan so-called "one man grand jury."

In each of these two cases, an unwilling wretch was compelled to attend the "one man grand jury" and testify about crimes involving bribery and corruption of public

officials. In each of the two cases, the judge, who acted as a grand jury, became convinced that the witness was telling lies and after a perfunctory hearing in which none of the constitutional rights of the witness was protected, found him guilty of contempt and sentenced him. In the *Oliver* case, the entire proceedings were secret. In the *Murchison* case the initial stages were secret but the hearing upon the charge of contempt was in the open. However, it also was conducted in so perfunctory a manner as to violate the rights of the witnesses. The *Murchison* case also included another unwilling witness who refused to testify unless his counsel could be present. Such second witness was also sentenced for contempt.

The petitioner in the present proceeding was not deprived of any of the rights to which he was entitled under the *Oliver* case or the *Murchison* case.

1. The petitioner had reasonable notice. Throughout the entire period he was fully aware of all that was being done. He knew what he was doing when he advised his clients to violate the restraining order (R. 23-25, 27-30).

2. He had public hearings on June 1, June 3 and June 7.

3. He had a reasonable opportunity to defend himself. The trial court told him that he ought to be represented by counsel and that if he did not select a counsel, the trial court would appoint one (R. 28). In fact he was so represented on June 7 (R. 31).

4. Any objection which the petitioner might have had to the refusal of the trial court to permit him to testify under oath (R. 35) was waived when his counsel asked leave to read, and was allowed to

read, into the record what the petitioner would have testified had he been allowed to take the stand (R. 35 through 45).

5. Since the petitioner, in open court, freely admitted that he had advised his clients to disregard the temporary restraining order, no witnesses were called and hence he was not deprived of his right to examine them (R. 23-25, 27-30).

The Ohio Court of Appeals and the Ohio Supreme Court both considered at length the matter of the petitioner's constitutional rights. Both courts agreed that such rights had not been violated (R. 48-59) (Ohio Court of Appeals); (R. 63-70) (Ohio Supreme Court).

CONCLUSION.

This Brief is based upon a fivefold foundation, namely,

1. The principle that a petitioner who has failed to comply with Rule 23, Section 1(f) of the Revised Rules of this Court, may not raise at this time either the question of the jurisdiction of the trial court to find him guilty of contempt or the question of his having been denied due process of law during the contempt proceedings.

2. The principle that a state court may enjoin picketing when there is danger to life, limb or property.

3. The principle that a state court may enjoin even peaceful picketing when such is in violation of a collective bargaining contract.

4. The principle that a court of general jurisdiction, when confronted with a request for a restraining order, may determine whether it has jurisdiction to issue the same; and that pending such determination, an attorney for the defendant must respect such order if the court makes it.

5. The principle that a court may punish summarily an attorney who, by advising his client to disobey the court's restraining order and reiterating in open court his contemptuous attitude, is guilty of direct contempt, and that even if the petitioner's contempt had been indirect rather than direct, he still has not been deprived of due process of law by the way in which the court handled the contempt proceedings against him.

For the foregoing reasons the Ohio trial court did not commit any error or overstep its authority when it found the petitioner to be guilty of contempt and sentenced him. The Supreme Court of Ohio acted properly when it refused to release him in a proceeding of Habeas Corpus.

Therefore the judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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